



September 14, 2001

Mr. Kevin D. Pagan
Assistant City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2001-4118

Dear Mr. Pagan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151979.

The City of McAllen (the "city") received a request for a particular witness statement given on June 8, 2001, and all entries in the notary record books of three named individuals for the date of June 8, 2001. You claim that the requested information is excepted from disclosure under section 552.108 of the Government Code and section 143.089 of the Local Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that the requested information is excepted from public disclosure under section 552.108 of the Government Code. Section 552.108 provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

You contend that the requested information should be excepted under section 552.108(a)(1) and (b)(1) because it relates to an ongoing investigation and release of the information would interfere with the investigation. We note, however, that the section 552.108 exception is inapplicable to a police department's internal administrative investigations that do not involve an investigation of crime. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). Here, you state that the submitted information relates to an internal investigation regarding a complaint made against a peace officer. You do not indicate how the internal affairs investigation involves an investigation of crime. Further, a review of the submitted information provides no indication that the alleged behavior investigated was criminal. Therefore, we have no basis for concluding that section 552.108 applies to the requested information.

Next, you argue that release of the requested information "might subject the person giving the affidavit to possible intimidation and, further might harm the process of future cooperation." This office has held that information may be withheld from disclosure under section 552.101 in conjunction with the common law right to privacy upon a showing of certain "special circumstances."¹ *See Open Records Decision No. 169 (1977)*. This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.* In this case we find that you have not demonstrated an imminent physical danger that would constitute such "special circumstances." Thus, based on our careful review of your arguments and the submitted information, we conclude that you may not withhold the requested information under section 552.101 of the Government Code in conjunction with the common law right to privacy. As you raise no other exceptions with respect to the entries in the notary record books, this information must be released.

Finally, you assert that the submitted affidavit is confidential under section 143.089 of the Local Government Code. Section 552.101 of the Government Code excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. We understand that the city is a civil service city and, therefore, is subject to chapter 143 of the Local Government Code. Chapter 143 contemplates two different types of personnel files, one that the civil service director or designee is required to maintain as part of the police officer's civil service file, and one that a police department may maintain for its own internal use. *See Local Gov't Code* § 143.089(a), (g). Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director or the director's designee shall maintain a personnel file on each . . . police officer. The personnel file must contain *any* letter, memorandum, or document relating to:

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

(1) a commendation, congratulation, or honor bestowed on the . . . police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the . . . police officer if the letter, memorandum, or document is from the employing department and *if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter*; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

....

(g) A . . . police department may maintain a personnel file on a . . . police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a . . . police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the . . . police officer's personnel file.

Local Gov't Code § 143.089(a), (g) (emphasis added).

Section 143.089(b) of the Local Government Code specifically prohibits information regarding alleged misconduct from being placed in the officer's civil service file "if the employing department determines that there is insufficient evidence to sustain the charge of misconduct." *Id.* §143.089(b). The only information regarding misconduct that is to be placed in the civil service file is that which relates to "misconduct [that] resulted in disciplinary action by the employing department in accordance with [chapter 143]." Local Gov't Code § 143.089(a)(2); *see also* Local Gov't Code §§ 143.051-.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000).

Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.--San Antonio 2000, no pet.); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied). You do not specifically indicate that the submitted affidavit is maintained in the McAllen Police Department's internal file pursuant to section 143.089(g). However, as you inform us that the submitted affidavit relates to a complaint that is currently being investigated, we assume that no disciplinary action under chapter 143 has yet resulted against the

peace officer under investigation. Thus, we conclude that the submitted affidavit is not information required to be maintained in the civil service personnel file, and instead is part of the subsection (g) internal file. Thus, the submitted affidavit is confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Karen A. Eckerle".

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 151702

Enc: Submitted documents

c: Mr. Sam Bensen
2205 W. Jackson Avenue
McAllen, Texas 78501-7244
(w/o enclosures)